up. And it is the hope of the committee and its members that at the next meeting of the Society a valuable report shall be presented, with preliminary matter, and possibly some specimens of codification of certain matters which seem peculiarly susceptible of codification, and for which the present time seems peculiarly appropriate and right.

(As a preliminary to the work of the Committee on Codification, a number of members had been requested to prepare papers on the "Primary Sources of International Obligations," the "Relative Value of Authorities," and the "Plan of Codification" as recommended in the Preliminary Report of the Committee submitted to the last annual meeting.* As the result, the following papers were submitted to the Society on each of these subjects, respectively):

ADDRESS OF PROFESSOR LAWRENCE B. EVANS, OF TUFTS COLLEGE,

ON

The Primary Sources of International Obligations.

"Law," says Justice Holmes, "being a practical thing, must found itself on actual forces."[1]

Of no other branch of jurisprudence is this so true as it is of international law. Of no other branch of the law can it be said that the controversy has invariably preceded the rule. It alone has never suffered from the vagaries of legislators. It has never been enacted in view of imaginary situations which might never occur, but is always the product of situations that have occurred again and again. It is the result of the experience of humanity in its attempt to administer a political society made up of independent states.

If, therefore, it be founded on actual forces, it is pertinent to inquire as to what those forces are. Upon what considerations is the system based, and how have the nations who observe it determined what its content is to be?

First of all we must clearly distinguish between the reasons for the

* Printed in Proceedings for 1910, p. 197.

[1] Holmes, The Common Law, 213.

existence of international law at all and the factors or influences which determine its content. To the second of these queries several answers may be given; to the first there is but one answer. International law exists because international society exists, and no society of any kind can exist without law. Every human relation of sufficient importance to receive public protection finds its expression in the law, and the relations growing out of international society are no exception. The law in fact may be taken as evidence of the relation of which it is the outgrowth. If crime were never committed, we should have no criminal law. If there were no families, there would be no law of domestic relations. If men never entered into agreements with each other, there would be no law of contracts. And if nations lived in a hermit-like seclusion, there would be no international law.

But while the existence of international relations necessitates a system of rules by which they may be regulated, the content of those rules is capable of an infinite variety, — a variety indeed as wide as the " actual forces " upon which the law is founded, and as divergent as the points of view of the several nations who are parties to it. The acceptance of almost every important rule of international law has been preceded by a long period of discussion and of opposing views. Out of this conflict of opinion and of practice has finally come agreement expressed either in custom or in formal treaty and recognized as of binding obligation in the future conduct of states.

The question arises as to what distinction, if any, should be made between the terms usage and custom. The two are often used interchangeably. The Supreme Court of the United States said in 1832, " The law of nations is the usage of all civilized nations."[2] In 1876 Lord Coleridge said, " The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another." [3] James Bryce employs the two terms synonymously when he says that private law is " the offspring of custom, that is to say, of the usages of the community."[4] On the other

[2] United States *v.* Arredondo, 6 Peters, 691, 712.

[3] The Queen *v.* Keyn, Law Reports, 2 Exchequer Division, 63.

[4] Bryce, Studies in History and Jurisprudence, II, 742.

hand, Mr. Justice Gray, in 1899, speaking for the Supreme Court, refers to "an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law," thus making a distinction between usage and law.[5] Sir Frederick Pollock says of the word "custom" that it

> may be said to suggest the notion of potential or incipient legality. But on the other hand much custom is quite outside the usual sphere of law. Still the word has a certain ethical force tending to confine its use to those habits which the persons practicing them recognize as in some way binding. Such are, to take a conspicuous example, customs of tribes and castes which have a religious character. "Customary" carries more weight, though it may be only a little more, than "usual."[6]

The continental writers usually make a sharper distinction between custom and usage than do those of England. Gestoso y Acosta says:

> Custom is unwritten law introduced by usage, with the tacit consent of those who have voluntarily accepted it, and this usage, after having been observed for a considerable time, acquires the force and authority of law. * * * Custom presupposes an intermediate state between the lack of all law and the existence of a positive law, but reflects perfectly the moral, religious and scientific ideas of each people. Therefore religion, science and ethics must improve it, considering it as the most solid basis upon which the whole system of positive legislation may rest.[7]

And the eminent jurist the Marquis de Olivart says of the relation of custom to international law:

> Custom has in this branch of the law an authority and prominence which it entirely lacks in all the others. Since international law is not and can not be law in the true sense of the word, it can manifest itself only in the form of custom.[8]

[5] The Paquete Habana, 175 U. S. 677, 686. The court traces the history of the usage in question since the ordinance of October 26, 1403, issued by Henry IV of England and based on an agreement between himself and the King of France.

[6] Pollock; A First Book of Jurisprudence, 11.

[7] Gestoso y Acosta, Curso Elemental de Derecho Internacional Público, I, 37, 39.

[8] De Olivart, Tratado de Derecho Internacional Público, I, 104.

A distinction, it would seem, should be made between usage and custom as applied to international law. Usage, we may say, is the initial stage of custom. Usage is the testing ground of custom. It is the novitiate which must be served before the final vows which are binding are taken. Without usage there can be no custom. But usage in itself does not bind states to any given line of conduct. A usage with a long and uninterrupted history may finally be departed from by one or more states without creating the impression that any law has been broken or that any action has been taken which the states concerned did not have a perfect right to take. But when a usage has been followed for so long that states have come to feel that they are no longer at liberty to depart from it — when a usage becomes so fixed that a sense of obligation accompanies it — then the usage becomes custom. Mere frequent repetition of a particular line of conduct constitutes usage, but it does not constitute law. It is not until it is crystallized into custom and becomes obligatory that it becomes law.[9]

Custom, however, in order to become binding upon a state, must be met by a similar custom or law on the part of other states. No state will long continue a line of conduct in which it is not joined by other states. The idea of reciprocity enters into every rule of international law. It is true, as Chancellor Kent said, "The law of nations, so far as it is founded on principles of natural law [by which he means general principles of right and justice] is equally binding in every age and upon all mankind."[10] It is only necessary, however, to observe the relations existing between the members of the family of nations on the one hand and such states as China, Siam and Persia on the other, to perceive that the rules of international law are regarded as strictly binding only in relations with states that profess to observe them.[11]

[9] Sir John Davis says: "Custom, as understood in law, is usage which has obtained the force of law, and is in truth a binding law for the particular place, persons and things concerned." Cited in Pollock, First Book of Jurisprudence, 264. An interesting discussion of custom as law may be found in Carter, Law: Its Origin, Growth and Function, 66–122.

[10] Kent, Commentaries, I, 3.

[11] "En *fait*, même de nos jours, les Etats européens ou américains se sont con-

What qualities, then, must usage possess if it is to survive the tests to which it must submit in order to be transformed into custom? At bottom it seems to me there are but two, and I am not sure but that these two are one. It must be reasonable and it must be just, and since no custom can be reasonable which is not just, we may say that in the last analysis, those customs which appear to the civilized states to be reasonable and which are embodied in their habitual practice constitute a part of the system of international law. The statement of Demosthenes as to law in general applies well to this particular branch of it:

> The design and object of the laws is to ascertain what is just, honorable, and expedient; and when that is discovered it is proclaimed as a general ordinance, equal and impartial to all.[12]

In this connection, however, it is necessary to note another factor. International law is based upon unanimous consent. It therefore represents necessarily a compromise among many divergent views and conflicting interests. The same may be said of any legislative enactment, but in the latter case it is only necessary to bring about an agreement among the majority in order to establish the rule. But in the making of international law, each member of the family of nations possesses the veto power. Hence in international law, as in all law that is based on opinion, the result in many cases will inevitably be a compromise. The rule will be accepted by the most advanced nations, not because they are satisfied with it, but because they can obtain nothing better. It will be accepted by the least advanced, partly because they are unwilling to incur the odium of rejecting it. The result probably will not be entirely satisfactory to any nation. The spirit of compromise which is so essential to any successful social arrangement must be resorted to. When the convention which framed our Constitution adjourned in 1787, the document which they recommended to the States for adoption did not have the unqualified approval, there is reason to believe, of any of the men who had assisted in its formation. With but a few excep-

sidérés comme moins étroitement tenus envers les Etats musulmans et les Etats asiatiques." Bonfils, Manuel de Droit International Public, 21.

12 Demosthenes, Oratio I contra Aristogiton.

tions, however, they gave it their enthusiastic support, and urged its acceptance; and the success which has attended it as an instrument of government has fully justified the sacrifice of opinion which their action involved. When, therefore, I say that international law is based upon reason and justice, I do not mean to imply that all the parties to it are satisfied with the degree to which it expresses their conception of reason and justice, but only that when due allowance has been made for conflicts of opinion the result is the best expression now attainable of that sense of reason and justice which prevails among civilized nations.

Whatever international law may be, all agree that it is the product of the thought or action or ideals of civilized states. But what is a civilized state? One may say that it is a member of the family of nations, but this answer only pushes our inquiry one step farther back, and we then ask why it is a member of the family of nations. The reply to this question is likely to be, "Because it is civilized." In fact the phrase "civilized nation" is one of those which everybody uses, but which few attempt to reduce to exact definition. And this, I think, is due to two things — the fact that the term civilization is at best only a comparative term, and it is a term the meaning of which changes as the world itself changes. A French writer discourses on the theme in this graceful fashion:

What is it which distinguishes civilized nations from barbarous peoples? It is their political and administrative institutions, their public prosperity, their culture in literature, the arts, and the sciences, their society's comparative independence of nature, the individual's comparative independence of every other individual — in short, their continuous development, their march forward in the economic, intellectual, and moral order. In other words, a civilized man is one who looks to the future. This psychological trait is enough to distinguish him from the barbarian, who lives from day to day, spends as fast as he produces, and fritters away his activity at random for the mere pleasure of the moment. Facing the past, absorbed in the present, he foresees nothing. Generations identical in all respects succeed each other, bequeathing nothing but a fragile existence and living in immediate and continuous subjection to material things.[13]

[13] Nouveau Larousse, III, 31.

But this does not help us forward very much. Reduced to its lowest terms, the thought of this writer is that a civilized nation is one which makes progress. But from the standpoint of international relations, this is not an adequate conception. Progress is the rule, not the exception, in human societies. But there are many peoples which are making progress, but which have not yet made such attainments as to win recognition as civilized communities.

Among the writers on international law there are few who state categorically the qualities which a state must possess in order to be entitled to a place among those which we call civilized.

Professor Rivier identifies civilization with what he calls "*la conscience juridique commune.*" There is in the world a body of states whose conceptions of international relations are so much alike that they may be said to rest upon a common juridical basis. These states constitute the family of nations, and it is upon them only that international law is binding, for they alone recognize its responsibilities. And it is these states which we distinguish as civilized, for their civilization is also ours.[14] In other words, from the standpoint of international law, all elements of civilization may be disregarded except only those which concern juridical ideas and institutions. Especially may we eliminate religion, which was so long looked upon as the one common tie which bound civilized states together.

Another view is presented by Sir Thomas Barclay, who says:

The test in the distinction between civilized and uncivilized states which is regarded as warranting exclusion from enjoyment of the right to consideration as independent states, and admission to the community of the civilized world, is in practice the possession of a regular government sufficient to ensure to Europeans who settle among them safety of life and property. Every country, in prin-

[14] Rivier, Principes du Droit des Gens, 1, 7. It is interesting to compare this view with that expressed in a brief filed by the distinguished counsel James C. Carter and Elihu Root in a case which involved a review in an American court of a decision made in a French court. They said, "Except in England and some of her colonies, where the national standards of justice, and also the methods of procedure, very much resemble our own, we can have no full assurance that a just conclusion has been reached." Hilton *v.* Guyot, 159 U. S. 113, 125.

ciple, possessing such a government has *prima facie* the rank of a state and is entitled to treatment as a civilized community. Treaties made with it for the purpose of extraterritorial jurisdiction are intended merely to take into account a difference of judicial institutions, but are not supposed to detract otherwise from the possession of such equality and independence.[15]

This definition is worthy of careful examination. Sir Thomas makes recognition of a state as a civilized state to depend altogether on one thing — "the possession of a regular government sufficient to ensure to Europeans who settle among them safety of life and property." Every such country, he adds, "is entitled to treatment as a civilized community." But what would be said of a state which systematically violated its treaty engagements, which attacked friendly commerce on the high seas, which used explosive bullets or poisoned weapons in war, which regularly slew the prisoners which it took, and did not honor a flag of truce? Such a state would not receive recognition as a civilized state — no matter how regular its government nor how perfectly it protected the lives and property of Europeans resident within its limits.

Recognition of a state as a civilized state, it seems to me, is not quite so simple a matter as Sir Thomas Barclay's treatment of the subject would seem to imply. In the first place, there are several recognized members of the family of nations who are clearly unable to meet Sir Thomas's criterion. Judged by his standard, what must we say of certain of the Latin-American countries, whose conspicuous inability "to ensure to Europeans who settle among them safety of

[15] Sir Thomas Barclay, The Encyclopædia Britannica, 11th edition, XIV. 698. Professor Westlake expresses much the same opinion in these words: "When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it." Westlake, Chapters on the Principles of International Law, 141.

life and property" has filled the foreign offices of all the great Powers with complaints of injury and demands for redress? Venezuela is recognized as a civilized state, but the presence in Caracas in 1903 of ten commissions whose business it was to fix the amount of compensation due to the citizens of other countries because of the inability or unwillingness of the Venezuelan Government to protect the lives and property of foreigners is impressive evidence of the inadequacy of the criterion of civilization which Sir Thomas adopts. Turkey, also, must form an exception to his standard. No other member of the family of nations was admitted in so formal a way. Its entry into that charmed circle in 1856 was not in consequence of a newly-won independence, as in the case of the United States in 1783 or of Cuba in 1908, nor by the gradually accumulating evidences of progress and attainment, such as have given to Japan her place among the great Powers. Turkey had existed for centuries as an independent and sovereign nation with possessions in Europe, Asia and Africa, when finally the great Powers of Europe, in the most solemn manner possible, took her to their bosoms and declared her "admitted to participate in the advantages of the public law and system of Europe."[16] In the method of her recognition as a member of the family of nations, Turkey's case is unique. It had all the formality of the admission of a new State to our Union, and it was accomplished, I hope to show presently, in consequence of much the same sort of motives. How little it was due to Turkey's "possession of a regular government sufficient to ensure to Europeans who settle among them safety of life and property" may be seen from the elaborate precautions which the Powers which had stood sponsors for Turkey felt it necessary to take for the protection of the interests of their subjects by the establishment of consular courts in the Ottoman Dominion.[17]

The example of Turkey, it seems to me, is a very useful one for

[16] Hertslet, The Map of Europe by Treaty, II, 1254.

[17] An elaborate treatment of this complicated subject may be found in an article by Dr. André Mandelstam on "La Justice Ottomane dans ses Rapports avec les Puissances Etrangères" in La Revue Générale de Droit International Public, XIV, 5, 534, XV, 329. See especially the résumé in XV, 371–384.

indicating another distinction which should be made in our consideration of the term "civilized state." I compared the recognition of Turkey as a member of the family of nations to the admission of new States to the American Union. Our Constitution vests Congress with authority to admit new States, and makes that body the sole judge as to the time and manner and conditions of such admission. The framers of the Constitution doubtless intended that any territory of sufficient resources to maintain a self-governing community and a population of numbers and character suited to the administration of such a government should be allowed to come into the Union. But our history shows that Congress has acted from other considerations. It was certainly not a mere coincidence that for so many years a free State and a slave State were always admitted together. And surely it was not the character of the communities concerned which led to the admission of a mining camp like Nevada, while the Dakotas and Oklahoma were so long excluded. The admission of Turkey to the family of nations may fairly be compared to the admission of Nevada to the Union. The reason for the action of the Powers in 1856 is clearly shown in the language of the Treaty of Paris. After declaring Turkey "admitted to participation in the advantages of the public law and system of Europe," the Powers proceed to say in the very next sentence, "Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman Empire: guarantee in common the strict observance of that engagement; and will in consequence consider any act tending to its violation as a question of general interest." [18] Herein lies the explanation of the action of the Powers, which therefore ought not to be regarded as an expression of opinion as to the quality of Turkey's attainments in civilization. Whether a state is recognized as a civilized state or not, — whether it has a place in the family of nations, does not depend on its possession of a government capable of protecting the lives and property of Europeans living within its limits. Turkey was recognized as a civilized state not because she was such, but because the Powers

[18] Hertslet, The Map of Europe by Treaty, II, 1254–5.

thought they could better secure their own interests by admitting her to the family of nations than by excluding her.

If, therefore, we look for the meaning of the term civilized state as it is used in the current definitions of international law, we must seek it in something else than mere membership in the family of nations. When our Supreme Court declared that international law was the usage of civilized states, it did not have such communities as Turkey and Venezuela in mind. One never finds the acts of those governments cited as precedents for the guidance of other governments. The civilization of which our system of international law is the offspring is something far more significant than mere membership in the family of nations, or ability to guarantee the safety of the lives and property of foreigners. Membership in the family of nations when once acquired is not likely to be lost. Even the horrors of the Bulgarian massacres or the slaughter of the Armenians did not deprive Turkey of her place in the European system, but they certainly diminished any weight which she may previously have had in the development of international usage.

Civilization is a term of shifting meaning. The standards of conduct, both political and personal, alter. The practices which meet with the approval of one century may be sharply condemned by the next. In France, in 1766, the Chevalier de la Barre, a boy of nineteen, was convicted of passing within thirty yards of a religious procession without removing his hat, of uttering blasphemous words, and making blasphemous gestures. For this offense he was condemned to have his tongue cut out, to be beheaded, and to have his body burned. And this sentence was confirmed by the Parliament of Paris.[19] Yet France was regarded as a civilized state. In England at the beginning of the nineteenth century there were two hundred and twenty-three offenses punishable by death. If a man cut down young trees, he could be hanged. If he shot at rabbits, he could be hanged. If he returned prematurely from transportation, if he injured Westminster Bridge, if he wrote a letter for the purpose of extorting money, if he stole property valued at five shillings,

[19] Lowell, The Eve of the French Revolution, 114; Morley, Voltaire, 230.

or if he appeared disguised in a public road, he could be hanged. There was no other country in the world, said Sir Samuel Romilly, "where so many and so large a variety of actions were punishable with loss of life." Not only was the punishment severe, but the methods of trial and of inflicting punishment were cruel and inhuman. If a prisoner accused of a felony refused to plead, he could not be tried without his own consent. In order to obtain this it was lawful until 1772 to place the prisoner under a mass of iron and deprive him almost entirely of food. Many prisoners deliberately chose death by this method of torture rather than submit to trial, for in dying unconvicted their property, which their conviction would have forfeited to the state, was preserved to their families.[20] As late as 1820, when Thistlewood and his companions were condemned, the executioner first hanged and then beheaded them. If these methods still obtained in England, the public opinion of our day would compel our own and other governments to demand the right to establish in London consular courts for the protection of their citizens against the barbarities of English criminal procedure. Yet ever since the beginning of the family of nations, England has been regarded and rightly regarded as a civilized state.

The question as to what is a civilized state, therefore, is one for which each generation must find its own answer. Civilization is whatever the moral ideals of the time and place make it. It is natural for each state to make its own civilization the standard by which it measures that of others. If a state in general comports itself in accordance with the moral and political standards of the family of nations, especially in its relations with other states, it is recognized as civilized, and its conclusions as to principles of justice and rules of conduct may be expected to influence the opinion and the practice of the whole body of states, and thus contribute to the development of international law.

The study of law in recent years has been put upon quite a different basis by the introduction of what has come to be called comparative jurisprudence. Students of the law have not been satisfied to

[20] Kenny, Outlines of Criminal Law, 467; Stephen, History of the Criminal Law of England, I, 298.

know the rules merely of the common law on the subject of agency or of contracts. They have sought also to ascertain the rules of the Roman law, or perhaps even of the Mohammedan and Hindu systems. By a comparison of the results of their researches, by an examination of their resemblances and differences, they have arrived at a better understanding of the rules in which they were most interested and of the basis upon which they were founded. It has been one of the misfortunes of international law that it was not studied in the same way. International law is a distinctly modern European product, and it has been assumed throughout that there was no other system with which it could be compared. Most of the text writers to be sure do offer a few remarks on the difference between international law and the *jus gentium* of the Romans, but apparently for the purpose chiefly of showing that the two things were not at all the same. A comparison of that sort is of little help in any scientific investigation.

There is another field of study, however, which it seems to me would be likely to yield a rich harvest. In our contemplation of the international law of our own group of states we have allowed ourselves to be too much confined by the European horizon. That was perhaps natural, since Europeans formerly had few interests that took them beyond their own circle, or at most that circle of states in the neighborhood of the Mediterranean. When they did in time go farther afield, they encountered civilizations and modes of life so different from their own as to repel any thought of resemblance in ideas or institutions. But a close and sympathetic study would have shown likenesses that were little suspected. Without going into detail, which is impossible in the limits of this paper, I will mention a few features of the international customs of the ancient nations of the Far East which seem to me to indicate a field which would repay careful study on the part of those who would understand the principles upon which the international law of the European states is based.

There was a state system or family of nations in the Far East just as there is in Europe, and while the differences are numerous, the resemblances are also numerous. A single example may be taken

as illustrative of the ideas upon which their international relations were based. In the ancient empire of China were twelve states whose rulers recognized the Emperor of China as suzerain, but who seem to have held somewhat the same relation to each other as the King of Prussia had to the King of Saxony in the days when both of them recognized the Holy Roman Emperor as their superior. In the year 544 B. C. (*i. e.*, about fifty years after Solon's time), the twelve princes negotiated a treaty of which the following were the chief provisions:

1. That the exportation of grain should not be hampered.
2. That the common rights to rivers and mountains should be respected.
3. That no one of the signatories should support a conspiracy against the others.
4. That criminals who were fugitives from justice should be delivered up.
5. That each of the signatories should support the others in case of famine.
6. That each should assist the others in case of insurrection.
7. That all should have the same friends and the same enemies.
8. That all should support the imperial house.

And the oath by which this agreement was witnessed put it in the most solemn light possible:

We swear to observe faithfully the terms of this treaty. May the gods of the mountains and the rivers, may the spirits of our emperors and princes of happy memory and may the ancestors of our seven families and of our twelve states be our witnesses. If any one of us dares to violate this promise, may the all-seeing gods so smite him that his people may abandon him, his life may be destroyed and his race be made extinct.[21]

Here are set forth certain notions of international obligations that represent high conceptions of international relations. Especially noteworthy is the emphasis put upon the solemnity of the treaty and the necessity for observing good faith. But the customs observed by

[21] W. A. P. Martin, "Les Vestiges d'un Droit International dans l'Ancienne Chine," in La Revue Générale de Droit International Public, XIV, 227, 237.

the Chinese states in their relations with each other and with other nations covered a much wider range than is indicated by this one treaty. In general the political and social practices of the various divisions of the Chinese peoples were governed by common principles. There was an exchange of ambassadors regulated by an elaborate ceremonial. Treaties were formally drawn up, solemnly ratified, and preserved in a sacred place. Diplomacy was recognized as a profession, and certain rights of neutrals were well known and respected.

In Japan likewise there were well defined principles for the regulation of international relations. As far back as 219 B. C. provision was made for the naturalization of certain foreigners resident in Japan. Relations with China were begun about 100 A. D., and a regular exchange of ambassadors between the two countries was established in 607 and 608 A. D. Professor Takahashi enumerates eleven juristic conceptions growing out of international relations which were held by the Japanese, among them being the idea of the independence and equality of sovereign states, the sacredness and dignity of ambassadors, the idea of intervention in the affairs of another state which was recognized as an independent state, the obligation to treat prisoners of war with humanity, and to refrain from the pillaging of enemy property, the prohibition of certain means of warfare, as *e. g.*, poison, and the obligation to observe a flag of truce. And he adds that in the war with China in 1894, as well as in the Boxer revolt in 1900, the Japanese army and navy easily conformed to the modern usages of war because those usages had been familiar to them in many aspects for generations.[22]

In view of these few examples which I have given, I venture to suggest that a study of the ideas underlying the regulations of international relations which were evolved by the peoples of Asia before they came within the influence of Europe would throw much light upon the conceptions with which we are familiar in our system of international law. Especially would this be likely to be the case in all questions of a philosophical or speculative nature.

[22] S. Takahashi, "Le Droit International dans l'Histoire du Japon" in La Revue Générale de Droit International Public (2d series), III, 201.

The Oriental mind is, as is well known, essentially introspective. That group of races which produced all the great religions of the world must have reached interesting and valuable conclusions as to the nature of society and the principles which ought to govern the relations of one political society with another. A study of those conclusions and the reasons upon which they are based should be valuable not only for the positive contribution which they might make to the understanding of our own system, but also as a means of promoting a uniform system for the regulation of international intercourse by such adjustments or additions or even compromises in the European system as may make it more acceptable to the peoples of the Orient. Japan's recognized place in the family of nations is due to her acceptance of European standards of international conduct. Entirely apart from the question as to whether those standards met with her approval or not, that was the condition to which she must submit if she was to stand on the same plane with most of those states with whom her political and commercial relations were of the greatest importance. But Japan has shown herself to be possessed of military power of the highest efficiency. By her international conduct and by her judicial institutions she has convinced the world of her right to be admitted without qualification to the family of nations — the only non-Christian country which has attained to that status. As a newcomer in the circle which she has so recently joined, her first impulse is to comply with established ideas and practices. In the society of nations, as in the society of individuals, the first task of the new arrival is so to comport himself as to win the commendation of his new associates. Only those whose position is of long standing and is well assured may venture upon innovations. With the lapse of time, therefore, we may expect Japan to feel it less incumbent on her than at present to comply with Occidental rules as to international relations, and if her kindred people, the Chinese, in consequence of the momentous changes now in progress among them, should develop a government approaching even remotely in efficiency to that of Japan, and should win a like place in the family of nations, as now seems probable, they will together introduce a new and powerful influence into our conceptions of inter-

national law. Their military and commercial position will be so strong that compliance with Occidental standards when those standards seriously differ from their own will seem to them too large a price to pay for recognition in the family of nations. One of two things will inevitably result. Either the states of the world will be divided into two groups with two systems of international law, an Oriental and an Occidental, just as the Occidental states themselves are at present divided into two groups with reference to the origin of their private law, some deriving it from the Roman law and others from the common law, or else our present rules of international law will be adjusted to the conceptions of the Oriental states and become more truly international because based upon principles receiving a recognition which is more nearly universal. And this would be an important step in the promotion of international unity.

Men have long found a singular attraction in the establishment of some sort of authority which would command the allegiance of all mankind. The unity of the human race seems to have been present in their thoughts, even when it did not find expression in their words. Hence the reasonableness and the desirability of an organization through which that unity could be given tangible form. It was the dream of the Stoics. It was realized so far as the western civilized world was concerned in the Roman Empire. That in turn was succeeded by the Mediæval Empire, almost all the vital strength of which may be attributed to the idea of universal authority which it represented rather than to any great power which it exercised. The Empire waned and the Church grew — the most relentless tyranny probably to which the people of Europe ever submitted. Like the Empire, the strength of the Church lay largely in its claim to universal dominion — one moreover which was built on a divine foundation. The rise of the new nations in the period of the Crusades, the assertion of individualism in the period of the Renaissance, and the destruction of religious unity in the period of the Reformation, seemed to relegate into the category of dead things all possibility of our ever beholding the unification of Europe and much less the unification of the world. The dividing lines which

had been produced in Europe by the changes just mentioned seemed to be sharpened by the work of the explorers who brought the white men of Christendom face to face with the blacks of Africa, the red Indians of America and the yellow races of Asia. The faith of the European was sadly strained when he was asked to believe that of one blood God had made all nations. But in the midst of the chaos into which the conflicts of the Reformation had plunged the people of Europe, was heard the voice of Grotius proclaiming a new principle — new at least in so far as the practice of Europe was concerned — the principle that the nations themselves are governed by law — that they are subject to duties and obligations which they are not at liberty to ignore, and that the independence and equality of states does not mean anarchy and chaos, but order and the rule of law. No message to mankind ever met with a more ready acceptance. In less than a generation it was made the basis of the most important international agreement that Europe had ever known. And as time has passed, its hold upon man has become only the more secure. And hence it seems to me the race is but returning to the dream that has haunted it for so many generations. Its form, however, has changed. Unity it is now felt must be found in ideas rather than in institutions. The Empire and the Church sought to establish a universal dominion, which was realized, however, only in so far as they were able to compel it. But in the general recognition of principles of justice, in the voluntary submission of the nations to the rule of law, the world is finding that unity which it has so long sought. If more intangible than the universal Empire and the universal Church, it is all the more real. And when in the fullness of time the nations, conscious of their unity, shall seek to give it expression, they will do so neither in the edicts of an Emperor nor the decrees of a Pope; for law and justice will always find their fittest expression in the reasoned judgments of a court.

ADDRESS OF DR. HARRY PRATT JUDSON, OF THE UNIVERSITY OF CHICAGO,

ON

The Primary Sources of International Obligations.

It should be remembered at the outset that international law consists simply of such a body of rules governing international relations as have been accepted by the family of nations. There being no common superior authority, it is necessary, in order that there should be any rules of international conduct, that there should be a general agreement. A rule, therefore, is law not because it ought to be law, not because of any ethical consideration primarily, not because of any other consideration in fact than that it has been agreed to by the nations.

The reasons which induce nations to agree to any such rules are another matter altogether, and they are to be differentiated sharply from the rules themselves. These reasons may be any of a large number, and a discussion of these reasons is indirectly a discussion of the immediate source of international obligation. The obligation of nations to observe the rules of international law rests simply on the fact that the rules in question have received international assent, and then on the further fact that each nation is in honor bound to act in accordance with that assent. Of course it may be said that it is a matter not merely of honor, but also of prudence. By putting itself outside the limits of the general international agreement a nation of course fails to receive the benefits of international law. These two fundamental motives, honor and advantage, are so interwoven that it is difficult always to differentiate them.

Nevertheless, of course, it is also true that the considerations which lead one nation to assent to a proposed principle of law are likely to weigh largely with other nations. The civilized nations of the world differ in their immediate interests. The general interests of nations, however, are pretty much alike, and the ethical considerations which weigh with one nation are in the main equally influential with other nations. A brief study, therefore, of these considerations has a very direct bearing upon the subject.

The general interests of nations, as has been said, we may distinguish from the immediate interests. It is to the benefit of every nation that there should be regular and uninterrupted intercourse with all nations; travel and commerce should be made easy rather than difficult; the exchange of knowledge and of everything bearing on the progress of humanity should be facilitated. All these things are a part of the general advance of the ages, and find their expression in a considerable number of the rules of international law. It is to facilitate such matters, in large part at least, that the immunities of diplomatic agents are established and maintained; it is for the sake of these advantages, to a large extent, that treaties have their sanctity and that modes of interpreting and enforcing treaties are rather uniformly adopted. The general practice of establishing consular conventions and the rights of consuls under such conventions are pretty uniform among the nations. While it is true that each nation reserves the right to regulate its commercial intercourse with other nations as it may deem best, nevertheless discriminations against any single nation are in these days regarded as on their face an unfriendly act. It is to the advantage of all nations that peace and order should prevail throughout the world. Every international agreement, therefore, which tends to reduce the likelihood of a disturbance of the condition of stability among the nations is in the general interest. Any agreement which may tend to prevent a general condition of turbulence in any given state is for the interest of all.

Against general interests such as have been discussed above may be set off the particular and local interests of any given state. It may be to the advantage of a given state that it should exercise a general international authority in a particular part of the world. The United States has regarded it as disadvantageous to itself for the military nations of Europe to establish themselves on the American continent. Japan has regarded it as of vital interest to itself that no other great military Power should control Korea. It is the conflict of such local interests with the local interests of other states or with the general interests of the world at large which gives rise to serious international difficulties, and which is in fact the most

fruitful cause of international hostilities. To reconcile such local interests with the general interests of nations affords room, on the other hand, for the highest powers of statesmanship.

Of course, each nation is likely to consider with especial emphasis its own especial interests. To a large extent this is justifiable. Every nation has the right of maintaining its autonomy, and anything which may tend to militate against the independence and integrity of a nation it may resist by every means in its power. If the nations, once and for all, could agree on the establishment of such a condition as involves maintaining the independence and integrity of every existing state, and should provide a common means for preventing invasion of that sphere, then every state could safely transfer from its own power to the general body of states its own protection, just as within any given state the individual in the main must transfer the protection of his life and property from himself to the police power of the community. This desirable state of affairs is much easier to put in words than it is to convert into fact. It will be a great achievement of humanity, a great advance in civilization, for such an arrangement to be reached.

There are some principles of international ethics which affect nations on the whole about alike. There is a generally prevailing sense of humanity in these days far beyond anything which was the case a few centuries past, and this sense of humanity is steadily increasing. It is for this reason that nations have readily assented to various rules of international law which relate to the suffering which war necessarily brings. At best war of course is brutal, and General Sherman's statement that "War is hell" is not very far from being quite literally true. Even so, something can be done to lessen the horrors even of hell, so far at least as it is subject to human control. The fundamental principle that the primary purpose of weapons of war is not to cause death or mutilation but simply to break down resistance is the heart of the whole matter. In accordance with this principle it readily follows that the use of poison, whether in food or water or in missiles, is forbidden. From the same considerations a Red Cross flag, when not abused, should not be subject to hostile action. The prohibition of seizing private

property on land without compensation, and of the use of violence to noncombatants, comes under the general head. In other words, the primary purpose in acceding to such rules as these, I think, is a consideration of humanity. Of course it may also be said that there is an advantage which each state receives from the acceptance of these uniform regulations. Even so, it is the other reason, it seems to me, that has more weight.

There is a common sense of justice among civilized states which does not differ very much. Whatever be the weight of self-interest in dealing with certain problems, there remains a pretty fair judgment everywhere as to what is or is not just as applied to a given line of conduct. On the whole, therefore, the nations will be led to accede to a rule if it can be shown that it is based in such reason and equity.

There is a body of international ethics, then, which can not be held to consist in the rules of equity which any one individual, or for that matter any one nation, considers binding, but only in such rules of equity as on the whole commend themselves to all nations alike. The advance of civilization tends more and more to unify these principles among the nations, and therefore to make it easier for international agreements to be made which are based on ethical considerations.

The question as to what is involved in the essence of civilization may be in its ultimate refinements difficult of analysis. The broad lines, however, of what we mean by this concept are easily enough outlined. Civilization involves a condition of things characterized by civil order, by social justice, by intellectual and material progress, and by international equity. All these elements must cooperate to produce that large result which in these days we mean by civilization. The absence of any one of them removes the state in question from the possibility of being considered to the full extent a member of the family of nations. It is the presence of all of them which constitutes a state, on the other hand, as a qualified member of this international society among whose members the rules of international law are binding.

Of course the extent to which any one of these elements of civilization may be developed in a given state may differ at different times, and also there may be a difference among different nations. The progress of the world means progress in civilization, and that means of course progress in the different elements of civilization. It is one great function of international law to advance progress in all the elements of civilization, and conversely to prevent every act of the nations, or of any nation, which will tend to retard such progress.

But there are also international duties which lie quite outside the field of international law. These may be considered to be moral duties as contradistinguished from the legal duties above discussed. Legal duties of nations one to another include the observance of the accepted rules of international law. Moral duties involve the observance of a further set of rules which have their source in the nature of states as moral beings guided by a sense of honor and justice and good will. Thus, quite above and beyond all rules of law, nations owe courtesy in all relations, justice in all transactions, and ready assistance in time of trouble. The surrender of Tweed by Spain to the United States, although his offense was covered by no extradition treaty, was an instance at the same time of international courtesy and of justice worthy of the most scrupulous sense of honor of any high-minded individual. The prompt aid afforded on occasions of especial distress, as the volcanic destruction of Martinique and of Messina, on which occasions different nations contended in friendly rivalry for precedence in generosity, illustrates well the duty of aid to one's neighbors in time of trouble.

In all these things sovereign states, which are corporate entities, are strictly analogous to natural persons. The extra-legal obligations of individuals, derived from a body of ethics which goes far beyond the requirements of law, are after all the cement which holds society together. The progress of municipal law is in the direction of assimilation of its mandates to these fundamental ethical principles. In like manner the progress of international law approximates the rules of international ethics.

ADDRESS OF PROF. WM. I. HULL, OF SWARTHMORE COLLEGE,

ON

The Primary Sources of International Obligations.

The distinction should be clearly drawn, at the outset of the codification of international law, between:

I. The law *of* nations, or extranational law;

II. The law *between* nations, or international law;

III. The law *over* nations, or supranational law.

I. The Law of Nations. By this phrase is not meant, of course, the municipal law of the several nations or states; nor should it connote any longer the old Grotian conception of the *jus gentium*, whether that conception was of a body of rules framed by the Romans for the regulation of their international affairs, or of a body of universal law based upon the precepts of reason. But it may now be taken to mean, in the language of the committee,[1] "either a municipal digest of the law of nations, or the law of nations as understood and interpreted by the government [of each of the several states]."

It is not to be presumed that the Society desires to further a codification of this *ex parte* and, therefore, unauthoritative, kind; although each nation's interpretation of the law of nations would be useful in indicating points of uniformity and divergence.

II. The Law between Nations, or international law in its etymological sense, may be used to connote the rules in force, and the standard of conduct expressly recognized, between the specific nations who have applied those rules in their mutual intercourse or recognized that standard of conduct in their conventions with each other. Under this definition, there would be one body of international law existing between the United States and Great Britain, for example, and one quite different between the United States and the German Empire.

If the proposed international court is to be constituted between only a few of the nations, a codification of the law between those nations would certainly be of great utility; but it would be of insuffi-

[1] Preliminary Report, Proceedings, 1910, p. 209.

cient scope to be applied in a court designed for the entire family of nations.

III. By the Law over Nations is meant neither a composite photograph, nor an amalgamation, of national interpretations of international law, nor a collection of the rules in force between pairs or groups of nations, but a body of law so universal in scope, so expressive of the genius of the family of nations as a whole, that it may serve as a basis for a genuine international court of justice. And this, it is to be assumed, is what the Society desires and the committee is seeking.

The fundamental distinction noted above may be illustrated by a similar one which is included in the term "the law of the United States." This expression might mean, first, the law of the States within the Union; or second, the law which controlled the mutual relations of each of the original thirteen between the years 1776 and 1789; or, third, the law which was brought into existence by and for that new entity termed "The United States of America." Without insisting upon the analogy in all its details between "The United States of America" and the twentieth century's "Family of Nations," there is no doubt that as a result of the manifold internationalizing tendencies of recent years, there has come into existence a new political entity which still retains the old name of the "Family of Nations;" that this new entity is neither the sum total of the nations composing it, nor the reflection of a few of its members — the great Powers, — but a genuine something new under the sun, with a sphere and functions of its own. With it has come, if not a new world citizenship to each individual, at least a new function to each of the states which are the organs of this new organism; and with it has come also the rudiments of new organs, namely, the embryonic world-legislature and world-tribunals with which we are striving to familiarize ourselves and to develop.

It is for this new organism that there is needed a codification of "International Law" in its new signification, or what has been called in the above analysis, "Law *above* the Nations." This term, it is realized, is not only awkward, but may be suggestive of the divine right of the great Powers, or the higher law of various kinds;

and perhaps "Supranational Law" might be a more acceptable term; in which case, the terms "Extra-national Law," and "International Law" might be applied to the other two kinds.

Another requisite distinction meets us on the threshold of the inquiry. Many writers, expressly or impliedly, have divided the sources of international law into the two classes of Direct and Indirect. Professor Oppenheim suggests that the first class alone form the true *Sources,* while the so-called Indirect Sources are really the *Causes;* and he illustrates his distinction by citing the *spring* as the true source of a stream, and implies that the rainfall, for example, is one of its causes and not its source. We come here to the familiar metaphysical problem of first causes and sufficient causes, and are inclined to say that whether we call the factors in question "Indirect Sources" or "Causes," they are none the less of great significance and can not be ignored. Their place in the proposed code must be clearly defined, and it would seem to be the exact truth, as well as the simple truth, to say that the twofold classification of *Sources* and *Sanctions* will include them all and assign to each its proper place.

With the distinction clearly in mind, then, between "Supranational" law on the one hand, and "Extranational" and "International" law on the other, and between "Sources" and "Sanctions," the following classification may be suggested:

I. SOURCES OF "SUPRANATIONAL LAW."

1. Those conventions of The Hague which have been adhered to by all the forty-six nations invited to attend the Second Conference;

2. The awards of the Hague Tribunals in the nine cases which have been settled by them.

II. SANCTIONS OF "SUPRANATIONAL LAW."

1. Those conventions agreed upon at The Hague, which have not yet been adhered to;

2. The declarations and resolutions (or *voeux*) of the Hague Conferences which procured approximately unanimous assent;

3. The Declaration of London, Declaration of Paris, and other important pronouncements which have received wide acceptance;

4. Law-making treaties;
5. Arbitral awards other than those of the Hague Tribunals;
6. Decisions of prize courts;
7. International comity;
8. State papers relating to foreign affairs;
9. Governments' instructions to diplomatic and consular agents;
10. Certain municipal laws;
11. Certain decisions of municipal courts;
12. The opinions of publicists;
13. Usage;
14. Custom;
15. International public opinion;
16. The practices of an international police force or executive [if *force* is ever to be included within the sanctions of supranational law];
17. International morality.

It will be observed from the above list that the sources of genuine international law are only two in number; but the volume thus far produced is marvelously copious and rich in comparison with the short period of its production, and yet it is only the beginning of the broad river which is destined to flow from successive conferences and arbitral awards, or from the international legislature and arbitral courts of the future. The committee's task in this part of its labors — in its codification of "rules actually in force," or "rules to which nations have given express assent" (to use the committee's phraseology [2]) — will be comparatively simple and easy, but none the less useful and important, especially if it should continue from year to year to fit into its code the rules which are to issue from the successive conferences and arbitral tribunals.

But the truly Herculean task to which the committee must set its broad shoulders is that of codifying what it has called "ideal rules," or of erecting "a higher standard of conduct than has yet obtained in international intercourse, which might serve as a model for the future." [3] This process will be chiefly selective and interpretative.

[2] Proceedings, 1910, pp. 199 and 200.
[3] *Ibid*, p. 200.

From the vast mass of materials enumerated under the first sixteen headings of Class II, must be selected a harmonious body of rules, logically classified and lucidly stated. What the principle of this selection shall be is the crux of the whole matter.

The founders of our science would have had but little difficulty in giving an answer to this question. Ulpian would have found the requisite criterion in "the law which nature has taught to all living creatures;" Grotius would have found it in the voice of God speaking through nature to man's reason; Justinian would have found it in that *jus gentium* which he considered as universal as it was rational.

But the source of the good, the true and the beautiful is not to be thus easily grasped by the wool in these our degenerate days. To us, in international law at least, *vox populi* (or rather *vox populorum*) is *vox Dei*. Hence, we must seek for the principles of international morality, which are to serve as the criterion and the ultimate sanction of our "ideal rules," in all the sixteen headings mentioned.

And let it not be considered illogical to seek for both practice and principle in the same source. The code of individual ethics must be sought for in the actual conduct of individuals; and the same is true of both national and international ethics. The practice may be found to be conflicting, and the principles will certainly not be absolute, that is, good for all time and for all possible families of nations. But for the particular family of nations which occupies this planet at the present time, an approximation to the best and highest can be written in a code of international morality which will be quite as convincing and quite as conformable to the mind and conscience of the family of nations as the national codes of ethics are to the nations, or individual codes are to individuals. Like national and individual codes of ethics, the international code will be subject to change, growth, improvement; and this improvement will be reflected in, and recognized through, the sixteen kinds of activities on the part of the nations mentioned in Class II.

Ethical principles can also be derived, of course, from the two kinds of activities mentioned in Class I; but these will be morality in practice, or morality *in esse*, and, as is the case with national and

individual morality, they will be the average morality of the family of nations rather than its ideal morality, or morality *in posse*.

To illustrate: it has become the average practice of creditors in civilized lands, not to seize what is due them by the sure and inexpensive use of the strong hand, but to sue their debtors by due process of law; it has not yet become the average practice to forgive their debtors as they pray God to forgive their own debts to Him. It has become the average practice of civilized nations, not to neglect utterly the child-laborers in the mines and factories, but to secure for them the ordinary necessities and decencies of life; it has not yet become the average practice to assure to them the best means for their highest economic and spiritual development. It has become the average practice of civilized nations to give their neighbors fair warning before letting loose the dogs of war upon them; it has not yet become the average practice to settle all international disputes, even those of "honor and vital interest," by due process of arbitral justice. But in all three cases, both actual rules of conduct and ideal principles can be found in the practice of men, nations, and family of nations.

As to *necessity*, as an element in morality: there is nothing *necessary* except that which *is*, and that which is, is ever changing; hence the old distinction between necessary and voluntary international law has long since been found to have no reality in fact. The old adage that "whatever is, is right," has been repudiated in every phase of individual, national and international life; and the Grotian and Wolfian contention that natural law is necessary law has yielded to the discovery that mother nature, like human mothers, is very easy to be entreated or defied and leaves men and nations and families of nations the "masters of their fate, the captains of their souls." Mother necessity, too, though invention may be one of her children, has no such maternal relationship to law. On the other hand, if by necessity is meant sufficient sanction to enforce, we have only a difference of degree and not a difference of kind or of source.

As to *utility:* it is also a relative term. That is useful for individuals which is reflected in their practice; and the same is true of nations and of the family of nations. Bentham's quest for "the

greatest good to the greatest number" must be pursued, not in the clouds of theory, but in the actions and institutions of men. This does not mean, of course, that whatever is useful is good; for utility is the capability of satisfying human wants, and human wants are shown by human practice to be of varying value.

As to *usage:* the common distinction between usage and custom is that custom is the habit of doing certain acts which is enforced by the conviction that these acts are legally necessary or legally right, while usage is the habit of doing certain acts which is not so enforced. But usage must be enforced by *something,* or it would not exist; hence it differs from custom, in this definition, only in degree and not in kind; while to speak of custom as being legally necessary or legally right, is to confuse custom with law — the raw material with the finished product. Custom would really seem to differ from usage in being of wider scope and longer duration, that is, in being the habit of more individuals or nations, and in having been observed during a longer time. Hence custom has the validity both of universality or generality and of prescription; while usage is both particular and spasmodic or short-lived. Both custom and usage must be included, however, among the sanctions of "international" or supranational law, and both may well yield important ideal rules and principles of international conduct.

A definition of "*civilized*" as applied to nations, usages, etc., should be neither etymological, historical, political, nor ethical, but actual; that is, all the present members of the family of nations must be assumed to be "civilized," and the family of nations includes, at present, all those who were represented in the Second Hague Conference. Civilization does not imply uniformity, of course, and there are sundry steps upon its ladder; but it is a noteworthy fact that there is far less difference in civilization between the most diverse members of the family of nations than there is between the most diverse citizens of even the best organized and advanced of nations. Whether this is due to the low average civilization of the family of nations, as compared with the average civilization of its most advanced members, or due, as seems more probable, to the fact that

every nation puts its best foot foremost when it steps upon the world-stage, it is a most encouraging fact to those who are seeking to codify international obligations in preparation for an organ of international justice.

Self-interest has been held from the time of Hobbes to be the prime factor in individual and national life alike; and the Hobbesian school of international jurists would have us believe that all nations in their relations with each other are within its paramount sphere of influence; not only so, but they insist that self-interest is pure selfishness, without the remotest tinge of altruism. A myriad of facts have shown, however, that there is such a thing as *enlightened* self-interest, and that if it have a sufficiency of enlightenment it comes perilously near to downright altruism. For example, the theory, which was based on "self-interest," that in a trade between individuals, or a war between nations, when one party gains the other must inevitably lose, and *vice versa,* is now an exploded fallacy. Whether one's motto be "My own prosperity through my neighbor's prosperity" or "Prosperity to my neighbor so that I may prosper," one is interested in either case both in himself and in him who has been found to be his other self; and with the growth of enlightenment in international affairs, there has been much light thrown on the neighbors of the good Samaritan and the priest and Levite within the family of nations. Whether the enlightenment come from experiments in pure selfishness, or from some God-illumined Mount Sinai, it must be traced inductively, — by its fruits; and a discovery of its fruits will yield yet more light, in accordance with the law, valid in all realms of life, that to him who hath shall be given.

As to the *weight to be assigned to reciprocal contracts,* it will be seen from the foregoing analysis that only those compacts which fall within Class I are to be considered of any actual weight in codifying the genuine "international law" which we are seeking, and these compacts, all being absolute, are all of equal weight.

The law-making treaties, conventions, declarations, etc., mentioned in Class II are not rules of the new "international" or supra-

national law, but are sanctions of it, or reasons why it should be obeyed, and impulsions towards obedience to it. Their relative weight in the fulfilment of this function must be found, like the sanction which they exert, in their application, this application being both in the past and in the future: for there has already commenced a great struggle between the rules embodied in the various categories of Class II to be incorporated within the conventions of Class I. Whether or not the "fittest" shall survive in this struggle will depend upon the discernment of jurists and statesmen in selecting and adopting those rules which are backed by the most persuasive, and, therefore, most powerful, sanction.

In conclusion, I would advert again to the objection which can doubtless be urged against the foregoing analysis on the ground that both rule and standard, both the command and its sanction, are to be sought in actual practice. It may well be asked: How can one find both actual rule and ideal rule in practice alone? Well, after all, this is simply the old, old question of nominalism or realism, of *Universalia ante rem,* or *Universalia post rem.* It seems to me that it must be answered for international law as it has been answered in all other phases of universal life, by the Conceptualism of Abelard, namely, *Universalia in rebus.* If there be an ideal standard of abstract and absolute right, it can be ascertained in human conduct alone; just as God can be seen and known — here on earth, at least — through the image of man.

Let us, then, have, first, a code of actual rules for international relations, drawn from the two sources in Class I, which will be as exact and definite as anything human ever is, and which is destined to grow until it shall supply all international needs; and let us have, second, a code of ideal rules, or principles, or sanctions, drawn from at least sixteen of the categories in Class II, which shall serve as an all-sufficient explanation of why the actual rules should be obeyed, as an all-sufficient motive-power in procuring obedience to them, and as an arsenal from which future legal weapons may be drawn — or, to use a possibly more appropriate expression, as protoplasm out of which future supranational law may be created.